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IN THE

Supreme Court of the United States

October Term, 1977
Nos. 76-1121, 76-1153 and 76-1162

No. 76-1121

AMERICAN BROADCASTING COMPANIES, INC., CBS INC. and NATIONAL BROADCASTING COMPANY, INC.,
Petitioners,

vs.

WRITERS GUILD OF AMERICA, WEST, INC.,
Respondent.

No. 76-1153

ASSOCIATION OF MOTION PICTURE AND TELEVISION PRODUCERS, INC.,
Petitioner,

vs.

WRITERS GUILD OF AMERICA, WEST, INC.,
Respondent.

No. 76-1162

NATIONAL LABOR RELATIONS BOARD,
Petitioner,

vs.

WRITERS GUILD OF AMERICA, WEST, INC.,
Respondent.

On Writs of Certiorari to the United States Court of Appeals for the Second Circuit.

Respondent Writers Guild of America, West, Inc. Brief.

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Statement of the Case.

A. INTRODUCTION.

This matter is before the Court on the petition of the National Labor Relations Board ("Board"), three broadcast networks ("Networks"), and the Association of Motion Picture and Television Producers, Inc. ("Association"), to review a Second Circuit decision favorable to the respondent Writers Guild of America, West, Inc. ("Guild").

The Guild has represented writers at member companies of the Association, the Networks, and others for many years [Bd. Pet. App. 20a[1]] (not merely since 1970, the date the expired collective bargaining agreements [collectively referred to as "the Agreement"] were signed [Bd. Br. at 3-4]).[2] This dispute arose during the course of a strike by the Guild against the employers over the terms of a new collective bargaining agreement [Bd. Pet. App. 20a-21a].

The court below found as a matter of law that the Guild's discipline and the threat to discipline members who were supervisors, for crossing Guild primary picket lines at the members' places of employment, did not constitute a violation of § 8(b)(1)(B) of the National Labor Relations Act, as amended ("Act" or "NLRA"), 29 U.S.C. § 158(b)(1)(B).

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[1]"Bd. Pet. App." refers to the appendix to the Board's petition for a writ of certiorari. The appendix filed with this Court shall be designated "A." "GCX" refers to General Counsel exhibits before the Board.

[2]There were separate agreements for the Association members [GCX 2, A 233-92] and the Networks [GCX 9, A 314-80]; and among Association members for those engaged in theatrical work [A 236], and those in television [A 240]. In respects relevant to the issue presented the agreements were the same.

Among the Board's findings with which the Guild takes issue, is that the supervisors involved performed no rank-and-file duties during the strike; and that they had grievance adjustment functions vis-a-vis the Guild or its members.[3]

B. SOME OF THE SUPERVISORS PERFORMED SOME RANK-AND-FILE WORK DURING THE STRIKE.

Some of the persons involved in this proceeding—story editors (or as they are sometimes called, executive story consultants or executive story editors [Bd. Pet. App. 29a; A 108])—are writers who serve in a supervisory capacity over other writers [Bd. Pet. App. 29a; A 32-33, 49, 108-09; GCX 2, A 251], and who have all their employment terms and conditions governed by the Agreement [GCX 2, A 251]. Other supervisors, called "hyphenates" because they have either in the past performed, or concurrently are performing rank-and-file writing [A 44, 60, 69, 71-72, 212; Bd. Pet. App. 34a] in addition to such supervisorial work as producing (in which case the person would be a "writer-producer") [Bd. Pet. App. 21a-22a], are for the most part governed by the Agreement only when they perform covered writing services.

Both before and during the strike some of these supervisors performed certain non-supervisory writing services. These are known as "(a) through (h)" be-

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[3]While we recognize that it is the function of the courts of appeals in the first instance to make certain there is substantial evidence on the record as a whole to support the Board's conclusions, Universal Camera Corp. v. NLRB, 340 U.S. 474, 491 (1951), the Second Circuit found the Board to be wrong in this case as a matter of law [Bd. Pet. App. 3a-4a], and therefore did not reach the factual inquiries which are presented here.

cause they are contained in subparagraphs (a) through (h) in the Agreement. The (a) through (h) services are described in the Agreement as "writing," but when performed by producers, directors and other discrete persons, they may be done without *ipso facto* subjecting these persons to the obligations, or giving to them the benefits of the Agreement.[4]

The performance of (a) through (h) services is not limited to supervisors, however. For example, "polishing" of a script by a producer is within what the parties understand to be (a) through (h) [A

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[4]Article 1, paragraph B, section 1.a. of the Agreement [A 236-37] provides (with emphasis added):

> A "writer" is a person who is:
>
> (1) Employed by the Company to write literary material as defined herein . . . ;
>
> (2) employed by Company, who performs services (at Company's direction or with its consent) in writing or preparing such literary material or making revisions, modifications, or changes in such literary material regardless of whether such services are described or required in his contract of employment; provided, however that *any writing services described below* performed by Producers, Directors, Story Supervisors (other than as provided in Article 14 hereof), Composers, Lyricists, or other employees, shall not be subject to this Basic Agreement and such services shall not constitute such a person a writer hereunder;
>
> (a) Cutting for time
>
> (b) Bridging material necessitated by cutting for time
>
> (c) Changes in technical or stage directions
>
> (d) Assignment of lines to other existing characters occasioned by cast changes
>
> (e) Changes necessary to obtain continuity acceptance or legal clearance
>
> (f) Casual minor adjustments in dialogue or narration made prior to or during the period of principal photography
>
> (g) Such changes in the course of production as are made necessary by unforeseen contingencies (e.g., the elements, accidents to performers, etc.)
>
> (h) Instructions, directions, or suggestions, whether oral or written, made to writer regarding story or teleplay.

59, 75, 144];[5] and writers who are acknowledged to be employees under the Agreement are often employed to polish either their own, or other writers' scripts [A 103, 111, 169].

The Board found that among the services rendered to their employers by some supervisors during the strike, was (a) through (h) writing [Bd. Pet. App. 57a], including rearranging scenes [A 187-90]; having a secretary (after consultation with the supervisor) make the physical changes in the script [A 189]; or having others make changes in a script [A 205[6]].

The statement that "no hyphenate in fact did any rank-and-file writing during the strike" [Bd. Br. at 7] may be true with respect to writing *other than* (a) through (h); but the Guild was simply not in a position to contest what the supervisors said they did in the studios.

Because of the inaccessibility of the work area, the Guild was required to rely, with insignificant exceptions, upon the supervisors' version of what they did while at work. Of the sixteen who were tried by the Guild for crossing its picket lines and rendering services for

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[5]A "polish" is a minimal alteration of a script or scene [A 144]. It is performed for the purpose of "honing the material. Trying to make the dialogue better, more satisfactory. Trying to make . . . your effects more dramatic. Trying to meet very specific production problems . . ." [A 168-69].

[6]This same supervisor testified that he had never—not even before the strike—put a pen to paper, and that his writing services were performed, and his story credits and Guild membership obtained by giving oral instructions to another writer, who executed them [A 201-02]. Function (h), see note 4, *supra*, which the Agreement describes as "writing," includes "instructions, directions, or suggestions, *whether oral or written*, made to writer regarding a story or teleplay" (emphasis added).

a struck employer [A 399], eleven supervisors did not attend their internal union trials and so could not be examined about the work they performed [GCX 16C, D, E, G, I, J, K, L, M, N and O], and only four testified before the Board.

C. THE SUPERVISORS HAVE NO GUILD-CONNECTED COLLECTIVE BARGAINING OR GRIEVANCE ADJUSTMENT FUNCTIONS.

There was adequate testimony that at least some of the supervisors engaged in collective bargaining with labor organizations *other than the Guild*, or the adjustment of grievances of persons *other than writers*.

None of the hyphenates is alleged to have engaged in collective bargaining with the Guild. And despite the Board's conclusions to the contrary, this record will not sustain a finding that story editors or producers adjust grievances of writers. All the record shows in this regard is that they hire writers,[7] and tentatively assign writing credit.[8] Disputes which story editors

[7]There is a transcript reference [A 41] to the testimony of a producer that producers handle writers' grievances concerning writing commitments. The cross-examination of the witness shows, however, that the producer was simply being *asked* by his superior whether he had made a commitment to hire the writer in question [A 42], *i.e.*, the producer was called upon as a witness, not as a grievance adjuster.

[8]A producer or story editor makes an initial determination as to which writer shall receive screen credit for a story, and that tentative allocation of credit is submitted to the Guild [A 54]. Any dispute on the matter goes to the Guild's credits committee for resolution [A 55] under the elaborate internal Guild procedure described in the Agreement [GCX 2, A 249-75], which results in a final determination, binding on the employer and the writers [*id.*, A 262]. "[T]he decision, in other words, is the Guild's; no one else's" [A 142-43]. On this record there is no evidence that producers or story editors adjust grievances between their employers and the Guild concerning writing credit, since any credit disputes constitute internal Guild affairs.

purportedly adjusted were over the artistic approach to a writing assignment. For example, when asked about grievances that story editors are called upon to resolve, a witness said they were involved in "ameliorating writers' feelings when things have to be rewritten" [A 109].

There was, on the other hand, sufficient evidence that some hyphenates bargained with, or adjusted grievances of members of *other* labor organizations.

D. IRRELEVANT ISSUES.

Finally, there are a number of factual matters which, while interesting, are irrelevant to this proceeding. The first concerns the attempted resignation from the Guild of one of the hyphenates on the eve of the strike, which was not permitted [A 559-60]. This is irrelevant because it was not a charged violation and the Administrative Law Judge ("ALJ") determined that no finding could be predicated upon that incident [Bd. Pet. App. 64a-65a].[9] It is also irrelevant because the Board has found the same violation in other cases where this was not an issue. The second is the amount and disposition of the fines assessed against the hyphenates. This is irrelevant because it is a matter of state court concern should the Guild seek to collect the fines.[10] (Additionally, the fines and penalties were all "drastically reduced" [Bd. Pet. App. 46a] or eliminated completely during internal Guild appeals, prior to the completion of the hearing before the ALJ; no one was expelled; and no fine exceeded $3,900 [A 544-47].)

[9]Additionally, supervisors' intraunion relationships are not cover by the Act. See Florida Power & Light Co. v. IBEW, Local 641, 417 U.S. 790, 805 n.16 (1974). See also note 40, *infra*.

[10]See NLRB v. Boeing Co., 412 U.S. 67, 74 (1973); Booster Lodge 405, IAM v. NLRB, 413 U.S. 84, 86 (1973).

SUMMARY OF ARGUMENT.

I.

No Supervisor Was Disciplined for the Purpose, or With the Effect of Restraining or Coercing His Employer in the Selection of a Bargaining or Grievance Adjustment Representative.

Section 8(b)(1)(B), adopted in 1947, was designed to outlaw union attempts to restrain or coerce an employer with respect to his collective bargaining or grievance adjustment representatives. More than 20 years after enactment of the section, the Board adopted a theory that § 8(b)(1)(B) prohibits discipline of a supervisor for failing to follow union rules, because such discipline would involve the supervisor in a conflict of loyalties and would thereby restrain and coerce the employer with respect to his selection of a supervisor with § 8(b)(1)(B) functions.[11]

That theory was shown ill-founded by this Court in *Florida Power & Light Co. v. IBEW, Local 641*, 417 U.S. 790 (1974), where discipline by a union of its supervisor-members for crossing a picket line and performing rank-and-file work during a strike, was held not unlawful. The Court put to rest the conflict of loyalties theory advanced by the Board, and concluded that § 8(b)(1)(B) is violated by union discipline only where such discipline can adversely affect the supervisor's conduct *in performing his bargaining or grievance adjustment duties*. The present case contains no showing of any such adverse effect.

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[11]An "8(b)(1)(B) supervisor," or "8(b)(1)(B) functions," refers to collective bargaining and grievance adjustment, the sole supervisory functions which are mentioned in § 8(b)(1)(B).

Here, certain supervisors were disciplined for crossing the Guild's picket lines. The Board's theory was that since the supervisors did not perform rank-and-file services while at work, the discipline would adversely affect their grievance adjustment and collective bargaining duties—a non sequitur. The ALJ advanced an additional theory, that by the Guild's disciplining of the supervisors and securing their absence from work, the employer lost these supervisors' services.

The ALJ's premise is faulty because the disciplined supervisors are precisely the ones who *did* go to work, and with respect to whom their employers continued to enjoy their services during the strike. Moreover, the ALJ's reasoning focuses on the surface result—the supervisor's absence, a result which could come about by the clearly permissible process of appealing to the supervisor to uphold his union principles—rather than the resulting effect upon the performance of his § 8(b)(1)(B) services. It is the latter effect which this Court stated in *Florida Power* is determinative.

The Board, on the other hand, while purporting to apply this Court's ruling in *Florida Power*, has done so in such a fashion as to make it untenable.

The Board's conclusion of illegality was a per se result based simply on the fact that the disciplined members were supervisors who had collective bargaining or grievance adjustment functions, and that they did not perform the same quantity of rank-and-file work during the strike as did the supervisors in *Florida Power*. No rational regard was given to the impact of discipline *in this case* on the performance of the supervisors' § 8(b)(1)(B) duties.

The Guild's object in disciplining its members for crossing the picket line was lawful, as we show below, and there was no evidence or any basis for a logical inference of an adverse effect upon the supervisors' § 8(b)(1)(B) functions.

The only evidence introduced in this case concerning the effect of discipline, was that the supervisors might be affected in their ability to hire new writers, a function unrelated to collective bargaining or grievance adjustment. There is no justification for making the presumption of illegality that the Board has made.

The Board's conclusion also leads to an inequitable result. It permits supervisors to enjoy the benefits of the collective bargaining agreement, without sharing the burdens. And it impermissibly tips the scales in the collective bargaining process, since it gives to the employer something he has a right to secure only at the bargaining table, namely, protection from discipline of supervisors who the employer is not obligated, but nevertheless has permitted to remain members of the union.

II.

Florida Power Need Not Be Reviewed but Needs Only to Be Properly Applied by the Board.

Based upon the anomalous results reached by the Board in this case and others, the Networks would have the Court review *Florida Power* and overrule it. Based upon the same premise, the Guild would have the Board directed to properly apply *Florida Power*, for the result sought by the Networks is not the result intended by Congress. The Networks would simply return to the conflict of loyalties theory, which has no statutory or other basis.

ARGUMENT.

I.

NO SUPERVISOR WAS DISCIPLINED FOR THE PURPOSE, OR WITH THE EFFECT OF RESTRAINING OR COERCING HIS EMPLOYER IN THE SELECTION OF A BARGAINING OR GRIEVANCE ADJUSTMENT REPRESENTATIVE.

A. INTRODUCTION.

Section 8(b)(1)(B) of the Act was adopted in 1947 to protect employers against restraint and coercion with respect to the selection of their representatives for the purpose of collective bargaining and grievance adjustment. *Florida Power & Light Co. v. IBEW, Local 641*, 417 U.S. 790, 803 (1974). The legislative history makes clear Congress' intent, which was limited to blunting union attempts to force employers into industry-wide bargaining, and dictating who the employer's foreman or bargaining representative should be. *Florida Power*, 417 U.S. at 803-04.[12]

For almost 100 volumes of its decisions, from 1947 to 1968, the Board's interpretation of § 8(b)(1)(B) was limited to that which the legislative history indicated it was intended to govern, such as a union's

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[12]Relevant legislative history is found in Senate Report No. 105, 80th Cong., 1st Sess. 21, 1 Legislative History of the Labor Management Relations Act 427 (NLRB 1948) [hereinafter cited as Legislative History]; *id.* at 41, 1 Legislative History 503; 93 Cong. Rec. 3837; 93 Cong. Rec. 4266, 2 Legislative History 1077; 93 Cong. Rec. 3953, 2 Legislative History 1012.

A review of the legislative history is pertinent since each case must be examined in the light of the language of the Act and purpose of the statute. Local 1976, United Bhd. of Carpenters v. NLRB, 357 U.S. 93, 100-01 (1958). Tellingly, none of the petitioners cites any legislative history in support of the Board's present position.

picketing to secure a replacement of an employer's industrial relations consultant; forcing an employer to join or resign from multi-employer bargaining associations; or compelling the selection of particular foremen. (See cases collected in *Florida Power*, 417 U.S. at 798-99.)

But in 1968 the Board charted a new course: it held in *San Francisco-Oakland Mailers' Union 18 (Northwest Pub., Inc.)*, 172 N.L.R.B. 2173 (1968) that a union violated § 8(b)(1)(B) by disciplining a foreman for the manner in which he interpreted the collective bargaining agreement, even though the union had made no effort to secure the supervisor's replacement or otherwise engage in conduct specifically banned by § 8(b)(1)(B). The violation in *Oakland Mailers'* was predicated on the Board's conclusion that the union sought a "substitution of attitudes" on the part of these § 8(b)(1)(B) supervisors, which would require the employer to replace them or face the effective loss of their services as employer representatives. *Oakland Mailers'*, 172 N.L.R.B. at 2173.

From *Oakland Mailers'* the Board's next decisional step was a determination that § 8(b)(1)(B) prohibited the discipline of supervisor-members for the exercise of any management or supervisory function, whether or not related to collective bargaining or grievance adjustment.[13]

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[13]*See* New Mexico Dist. Council of Carpenters (A. S. Horner, Inc.), 177 N.L.R.B. 500 (1969) (supervisor disciplined for working for company that had no agreement with union); New Mexico Dist. Council of Carpenters (A. S. Horner, Inc.), 176 N.L.R.B. 797 (1969) (supervisor disciplined for hiring non-union employees), both NLRB orders enforced by 454 F.2d 1116 (10th Cir. 1972).

Finally, in *Wisconsin Electric Power Co., Illinois Bell Telephone,* and *Florida Power & Light Co.*,[14] the Board found violations where supervisor-members were disciplined not for their exercise of § 8(b)(1)(B) functions, nor even for the exercise of supervisory functions, but merely for working behind the picket line of their own unions. The Board's rationale was that working during a strike is the type of conduct an employer has a right to expect of supervisors, and union discipline to restrain the performance of such work serves to subvert the loyalty to which the employer is entitled. *Wisconsin Electric Power Co.*, 192 N.L.R.B. 77, 78 (1971).

On review of the conflict of loyalty cases, this Court held in *Florida Power* that the Board had strayed from the intent of Congress in enacting § 8(b)(1)(B).[15] The section had not been designed to cope with the conflict of loyalties problem, *Florida Power*, 417 U.S. at 813; rather, the loyalty issue was addressed through the exclusion of supervisors from the protections of the Act, *id.* at 805-13, 811 n.21, thereby

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[14]Local 2150, IBEW (Wisconsin Elec. Power Co.), 192 N.L.R.B. 77 (1971), *enforced*, 486 F.2d 602 (7th Cir. 1973); Illinois Bell Tel., 192 N.L.R.B. 85 (1971), *enforcement denied*, 487 F.2d 1143 (D.C. Cir. 1973), *aff'd sub nom.* Florida Power & Light Co. v. IBEW, Local 641, 417 U.S. 790 (1974); IBEW Sys. Council U-4 (Florida Power & Light Co.), 193 N.L.R.B. 30 (1971) (subsequent history identical to *Illinois Bell Tel., supra*).

[15]The majority concluded that the precisely directed legislative history, see note 12, *supra*, and the narrowly worded statutory language "reflect a clearly focused congressional concern with the protection of employers in the selection of representatives to engage in two particular and explicitly stated activities, namely collective bargaining and the adjustment of grievances." *Florida Power*, 417 U.S. at 803.

presenting employers with self-help options for dealing with this matter. *Id.* at 812-13.

Since § 8(b)(1)(B) was not intended "to extend protection to the employer from union restraint and coercion when engaged in any activity other than the *selection* of its representatives for the purposes of collective bargaining and grievance adjustment," *Florida Power*, 417 U.S. at 804 (emphasis in original), the Court found that

> a union's discipline of one of its members who is a supervisory employee can constitute a violation of § 8(b)(1)(B) *only* when that discipline may adversely affect the supervisor's conduct in performing the duties of, and acting in his capacity as, grievance adjuster or collective bargainer on behalf of the employer.

Id. at 804-05 (emphasis added). (In the two places where the Board's brief gives this same quotation [Bd. Br. at 10, 14] the word "only" is omitted.)

At the very minimum the Board is obligated to ascertain whether the discipline was such as to adversely affect the supervisor in the performance of his § 8(b)(1)(B) duties. We shall show that the Board failed to do that here.

The Board's present view, as initially expressed in *Chicago Typographical Union 16 (Hammond Publishers, Inc.)*, 216 N.L.R.B. 903, 904 (1975) (and adopted in the present case [Bd. Pet. App. 13a n.6]) is that where a supervisor has been disciplined after having engaged only in the performance of supervisory work,

> there is clearly a violation since it is reasonably likely that an adverse effect will carry over to the supervisor's performance of his 8(b)(1)(B) duties.

No evaluation of the facts in *Hammond* (other than to attempt to determine the percentage of rank-and-file work done); no reference to industrial experience; nothing other than the Board's conclusion that this result is dictated by *Florida Power*.

A violation of § 8(b)(1)(B) occurs, according to the Board, except where a supervisor who is disciplined for crossing his union's picket line at his employer's place of business has performed more than a "minimal" amount of rank-and-file work during the strike; and apparently to avoid the necessity of a case-by-case analysis, and without further explanation, the Board concludes that anything less than 45-50% is minimal.[16]

The Board's use of the "minimal" test lacks foundation not only in common parlance,[17] but in its asserted reliance upon *Florida Power* as well. Where this Court said that no violation of § 8(b)(1)(B) may be predicated upon a finding that supervisors were disciplined for performing struck work, the Board has substituted

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[16]"Minimal amount," according to the Board, is less than 45-50%. *See* Detroit Pressmen's Union, Local 13 (Observer Newspapers), 217 N.L.R.B. 576 (1975); Local 1959, United Bhd. of Carpenters (Aurora Modular Indus.), 217 N.L.R.B. 508 (1975); United Bhd. of Carpenters, Local 14 (Max M. Kaplan Properties), 217 N.L.R.B. 202 (1975); Bakery Workers Local 24 (Food Employers Council, Inc.), 216 N.L.R.B. 917 (1975).

In Wisconsin River Valley Dist. Council of Carpenters (Skippy Enterprises), 218 N.L.R.B. 1063 (1975), *aff'd*, 532 F.2d 47 (7th Cir. 1976), a finding of 30% rank-and-file work was held less than minimal, and thus insufficient to avoid a violation.

[17]Webster's New Collegiate Dictionary (1975) defines "minimal" as, "Relating to or being a minimum: constituting the least possible."

the conclusion that it is *only* the performance of struck work of more than a minimal amount which justifies union discipline of such supervisors.

In the present case, following its *Hammond* rationale, since there was found to be no rank-and-file work done by the supervisors (or at least not 50%), there was held to be an *ipso facto* violation. (The Board was incorrect in this finding as we shall show, since the [a] through [h] work was rank-and-file or at least not supervisory.)

B. THE BOARD'S READING OF § 8(b)(1)(B) CONFLICTS WITH THE ACT'S LANGUAGE AND INTENT, AND WITH THIS COURT'S DECISION IN FLORIDA POWER.

1. There Was No Unlawful Object or Effect to the Discipline.

We shall show first that the Board's presumption of illegality based solely upon the lack of evidence that the disciplined supervisors engaged in the performance of 50% or more rank-and-file work during the strike, is unwarranted. Next, that there is neither an evidentiary nor a logical foundation for the inference that supervisors in this case will be adversely affected in the performance of their § 8(b)(1)(B) duties.

a. The Guild's Object in Imposing Discipline Was Lawful and Does Not Warrant an Inference of Illegality.

The only reason for the discipline in this case was to secure Guild members' support of the strike [A 160-61], an object of prime importance during a labor dispute. *See NLRB v. Granite State Joint Board,* 409 U.S. 213, 218 (1972) (Burger, C.J., concurring opinion) ("unions have need for solidarity and at no time

is that need more pressing than under the stress of economic conflict"); *NLRB v. Allis-Chalmers Mfg. Co.,* 388 U.S. 175, 181 (1967):[18]

> Integral to this federal labor policy [of permitting unions to enforce collective action] has been the power in the chosen union to protect against erosion its status under that policy through reasonable discipline of members who violate rules and regulations governing membership. That power is particularly vital when the members engage in strikes. The economic strike against the employer is the ultimate weapon in labor's arsenal for achieving agreement on its terms, and "[t]he power to fine or expel strikebreakers is essential if the union is to be an effective bargaining agent. . . ."[19]

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[18]By the citation of *Allis-Chalmers* and other cases dealing with statutory "employees," we do not mean to gloss over this Court's admonition that unlike discipline of employees, discipline of supervisors is not expressly permitted (or prohibited) by the Act. *Florida Power,* 417 U.S. at 805 n.16. We intend only to show that securing support of a strike is lawful, and does not warrant the presumption of illegality which the Board makes without further analysis.

[19]*See also* Summers, Legal Limitations on Union Discipline, 64 Harv. L. Rev. 1049, 1066 (1951) ("The union may punish not only those who do the work of men who are on strike, but also those who give the employer any other aid during the strike"); Note, 87 Harv. L. Rev. 458, 469 n.70 (1973):

> Discipline of strikebreaking supervisors who perform supervisory work . . . vindicates an important union interest—the preservation of the strike as an effective economic weapon. Given the clear and direct impact of discipline for strikebreaking upon the union's interest, and the more speculative and indirect impact of such discipline upon the employer's representation, the interest balancing analysis would appear to suggest that such discipline be found lawful.

8 Suffolk U.L. Rev. 728, 758-59 (1974); Note, 19 Vill. L. Rev. 519, 530 (1974).

The deference shown to preservation of the right to strike as a legitimate tool with which there should be no tampering rests on the conclusion that a lawful strike "is an economic weapon which in great measure implements and supports the principles of the collective bargaining system." *NLRB v. Erie Resistor Corp.*, 373 U.S. 221, 234 (1963); *NLRB v. Insurance Agents' Union*, 361 U.S. 477, 495 (1960). *Cf. Local 76, IAM v. Wisconsin Employment Relations Comm'n*, 427 U.S. 132, 147 (1976).

"Congress has been rather specific when it has come to outlaw particular economic weapons on the part of unions." *NLRB v. Insurance Agents' Union*, 361 U.S. 477, 498 (1960); *see NLRA* § 13; *NLRB v. Drivers Local 639 (Curtis Bros.)*, 362 U.S. 274, 281 (1960) ("§ 13 . . . provides, in substance, that the Taft-Hartley Act shall not be taken as restricting . . . the right to strike . . . unless 'specifically provided for' in the Act itself"); therefore, it is basic that any restriction on a union's economic weapons must be express and not merely implied.

The removal of a union's disciplinary powers over its members—whether supervisors or not—cannot be left to implication as to the Congressional intent, because of the importance of those powers in the collective bargaining process. Limiting the right to discipline members for crossing their organization's picket line during a strike is a direct impingement upon a union's economic weapons, and as such would require an act of Congress. There is no statute which in so many

words imposes that limitation. Nor does the legislative history of the NLRA justified such a limitation.[20] On the contrary, that history confirms that the intent of § 8(b)(1)(B) is as narrow as its words. *Florida Power*, 417 U.S. at 803, 804.

The result of the Board's decision in this case is to diminish the Guild's economic weapons. That result can be justified, if at all, only by the clearest evidence that the conduct in which the Guild engaged was proscribed by the Act. In fact, however, the Board seeks justification by making an unfounded inference: the inference is that disciplined supervisor-members who perform rank-and-file struck work less than 50% of the time during a strike will be less faithful to their employers when adjusting grievances.

The legality of the Guild's strike (which is uncontested) and the permissibility of union discipline in general, serves to distinguish this case from *Radio Officers' Union v. NLRB*, 347 U.S. 17 (1954), cited by the Association for the proposition that the Board's infer-

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[20]In a case arising under § 8(b)(1)(A), which in common with subsection (B) uses the phrase "restrain and coerce" to define the outlawed conduct, this Court has said:

> When the literal application of the imprecise words "restrain or coerce" Congress employed in § 8(b)(1)(A) produces the extraordinary results we have mentioned [interfering with the right of a union to fine its members for crossing a picket line] we should determine whether this meaning is confirmed in the legislative history of the section.

NLRB v. Allis-Chalmers Mfg. Co., 388 U.S. 175, 184 (1967).

The legislative history showing a lack of any Congressional intent to secure the result arrived at here by the Board is detailed in note 12, *supra*. No citation to the genesis of the statute is found in the Board's brief for the propositions which it urges.

ence of unlawful conduct on the part of the Guild must be sustained. In *Radio Officers'* the respondents had engaged in discriminatory conduct, *id.*, 347 U.S. at 24-25, 28-31, 34, which was held to have the foreseeable consequence of encouraging union membership and thereby violating § 8(a)(3) of the Act, 29 U.S.C. § 158(a)(3). *Id.*, 347 U.S. at 44-45.

But as in *Local 60, United Brotherhood of Carpenters v. NLRB*, 365 U.S. 651 (1961), the present case "is . . . different from Radio Officers . . . where, discrimination having been shown, the inferences to be drawn" could be "left largely to the Board." *Id.* at 654-55.

This Court has repeatedly stricken Board presumptions or inferences which lacked a basis in fact. In *Local 357, International Brotherhood of Teamsters v. NLRB*, 365 U.S. 667 (1961), the Board concluded that a hiring hall arrangement which failed to contain certain Board-mandated provisions, inherently served to encourage union membership and was, therefore, illegal. *Id.* at 671-72. But in the absence of evidence that the arrangement was in fact used unlawfully the Court was unwilling to accept the Board's assumption that a union conducts its operations in violation of law. *Id.* at 676. *Accord, NLRB v. News Syndicate Co.*, 365 U.S. 695, 699-700 (1961); *NLRB v. Insurance Agents' Union*, 361 U.S. 477, 481-82 ns.4 and 5 (1960).

Here, there was no discriminatory or inherently unlawful conduct involved in the discipline. Indeed, when applied to statutory employees, discipline for crossing their union's picket line is *protected* activity. The bare incidence of discipline is at most a neutral factor in analyzing what effect it will have upon the supervisor's future performance of his § 8(b)(1)(B) duties. *Florida Power* requires at a minimum some evidence and analysis to demonstrate that the discipline under review may adversely affect the supervisor's conduct.[21]

The relevance, therefore, of evidence concerning the conduct for which the supervisor was disciplined, is to ground a conclusion or an inference as to the effect of such discipline upon the supervisor's ability to carry out his future § 8(b)(1)(B) duties.

b. The Board's Inference of Illegality Lacks an Evidentiary or Logical Basis.

i. *There was no evidentiary basis for the inference.*

The conclusion that the present discipline of supervisors for crossing a picket line will result in a future diminished capacity by these supervisors to vigorously joust on their employers' behalf with the Guild in the adjustment of grievances, leapfrogs the requirement of an evidentiary or experiential basis. "Obviously . . . an inference cannot stand if it is not drawn from substantial evidence on the record considered as a whole."[22] This Court has said that the Board

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[21]The conclusion is thus inescapable that a union's discipline of one of its members who is a supervisory employee can constitute a violation of § 8(b)(1)(B) *only* when that discipline may *adversely affect* the supervisor's conduct in performing the duties of, and acting in his capacity as, grievance adjuster or collective bargainer on behalf of the employer. *Florida Power*, 417 U.S. at 804-05 (emphasis added).

[22]NLRB v. Barberton Plastic Prods., 354 F.2d 66, 71 (6th Cir. 1965). *Accord*, Northern Petrochem. Co. v. NLRB, 469 F.2d 352, 355 (8th Cir. 1972); NLRB v. Howell Automatic Mach. Co., 454 F.2d 1077, 1083 (6th Cir. 1972) ("when the inferences . . . are not supported by substantial evidence . . . this Court has the duty not to accept such inferences"); NLRB v. Century Broadcasting Co., 419 F.2d 771, 779 (8th Cir. 1969); NLRB v. Englander Co., 260 F.2d 67, 77 (9th Cir. 1959).

may draw reasonable conclusions only "'within the limits of the inquiry from the proven facts. . . .'" *Radio Officers' Union v. NLRB*, 347 U.S. 17, 49 (1954).[22]

While the Board is free of court restraint to draw one rather than another inference from facts in the record, there must nonetheless be some basis for the inference it draws.

There was no evidence of an intent on the Guild's part to affect the employers' selection of § 8(b)(1)(B) representatives, nor was there any testimony of such an effect. In fact, there were some supervisors who testified that they adjusted grievances (of non-writers) during the strike, despite the threats of discipline [Bd. Pet. App. 44a n.16], yet the General Counsel put on no evidence concerning an adverse effect of the threats upon these supervisors. The only testimony in this regard was that if after the strike the Guild members would not work with the picket line-crossing supervisors, it would adversely affect the supervisors' ability to hire top writers [A 50-51]. While the hiring of employees is a supervisory function within § 2(11) of the Act, 29 U.S.C. § 152(11), it is not one of

[22]*See* Universal Camera Corp. v. NLRB, 340 U.S. 474, 490 (1951):

> [T]he Administrative Procedure Act and the Taft-Hartley Act direct that courts must now assume more responsibility for the reasonableness and fairness of Labor Board decisions . . . . The Board's findings are entitled to respect; but they must nonetheless be set aside when the record before a Court of Appeals clearly precludes the Board's decision from being justified by . . . its informed judgment on matters within its special competence . . . .

the specific functions mentioned in § 8(b)(1)(B) for which employers have protection; and such an effect does not result in a violation of § 8(b)(1)(B).[24]

The reason for the lack of evidence here is that the case was tried prior to this Court's decision in *Florida Power*, at a time when the Board considered any discipline of a supervisor for crossing a picket line to be unlawful. It did not even require of the General Counsel that he establish collective bargaining or grievance adjustment functions on the part of the supervisor. *See NLRB v. Rochester Musicians Ass'n Local 66*, 514 F.2d 988, 992 (2d Cir. 1975). The Board now seeks to remedy the absence of evidence by making a presumption of illegality based solely upon the percentage of rank-and-file work performed.

Even if there were any validity to the Board's present view, the available evidence in this case is that at least some of the supervisors performed rank-and-file services of the (a) through (h) type.[25] These services are not supervisory within the meaning of § 2(11)

[24]"Both the language and the legislative history of § 8(b)(1)(B) reflect a clearly focused congressional concern with the protection of employers in the selection of representatives *to engage in two particular and explicitly stated activities*, namely collective bargaining and the adjustment of grievances." *Florida Power*, 417 U.S. at 803 (emphasis added); *see* NLRB v. Rochester Musicians Ass'n, Local 66, 514 F.2d 988, 992 (2d Cir. 1975). The distinction between §2(11) and §8(b)(1)(B) functions was made clear in *Florida Power*, *id.* at 811 n.21.

[25]See note 6, *supra*, and preceding text. This evidence was only what the supervisors *admitted* doing. Board Member Fanning, in *Chicago Typographical Union 16 (Hammond Publishers, Inc.)*, 216 N.L.R.B. 903, 907 n. 21 1975), cogently asked, "How, during a work stoppage, is the Union

(This footnote is continued on next page)

of the Act; and even more clearly, they are not § 8(b)(1)(B)-type services. Indeed, they are exactly the type of writing services rendered on a daily basis by rank-and-file writers, and the Board's conclusion that the work undergoes a metamorphosis and becomes supervisory work when performed by supervisors [Bd. Pet. App. 35a] is without statutory support and contrary to the result reached in other Board cases.[26]

So far as the evidence is concerned, therefore, at least some of the disciplined supervisors performed rank-and-file work, albeit in an amount that cannot be determined from this record. The facts here will not support the weighing process (rank-and-file versus supervisory work) the Board has substituted for the reasoning and evidentiary requirements of *Florida Power*.

ii. *There is no logical basis for the Board's inference.*

Lacking an evidentiary foundation, the Board's carry-over conclusion could still stand if it represented recognition of a fact of common experience. *See Radio Officers' Union v. NLRB*, 347 U.S. 17, 46 (1954). The carry-over effect inference, however, does not meet

supposed to determine whether struck work is actually being performed, let alone gauge the percentage of struck work?" The fact that one supervisor was willing to present a copy of the script which he was producing to show that no writing had been done [Bd. Pet. App. 43a n.14] says nothing about the writing he may have done on other scripts, or about the writing of other hyphenates, especially when of the sixteen trials, the hyphenate failed to personally show up in twelve, and sent a surrogate witness and a lawyer, instead.

[26]In the cases cited in note 16, *supra*, the rank-and-file work the supervisors were found to have performed during the strike was the same type, and often in the same quantity, as that which they performed prior to the strike. The fact that the unions in those cases permitted supervisors to perform such work, did not result in a finding, as it does here, that the work has been transformed into supervisory duties.

this test either, and furthermore, leads to an absurd result.

The absurdity is apparent from the fact that it applies to all supervisors, whether they adjust Guild members' grievances or not. For example, there was no evidence or finding of grievance adjustment or collective bargaining functions on the part of directors or certain executives, vis-a-vis the Guild or writers.[27] Yet the Board infers that they too will have a diminished capacity to effectively represent their employers in adjusting grievances as a result of Guild discipline. And the same inference is made with respect to those who crossed the picket line to perform (a) through (h) work, which is not even supervisory, let alone 8(b)(1)(B).

Whether there will be a carry-over effect depends upon how the supervisor foresees his future relationship with the disciplining union and how he in fact will react when again confronting that organization in grievance adjustment or bargaining.[28] To the extent that a particular supervisor does not and will not deal with the Guild on § 8(b)(1)(B) matters, it is illogical to infer that he will be affected in his § 8(b)(1)(B) duties.

[27]Unlike producers, who were found (in our view without evidentiary support, see notes 7 and 8 and surrounding text, *supra*) to adjust writers' grievances [Bd. Pet. App. 27a], the ALJ found directors to be in charge of the principal photography of films, and as such, they were § 8(b)(1)(B) supervisors over the crew and actors [Bd. Pet. App. 28a]. There was no evidence of grievance adjustment or collective bargaining with writers.

[28]There is no contention—nor was there any evidence—that any of the supervisors engaged in bargaining with the Guild; only that some had grievance adjustment functions with Guild members (but not with the Guild), and with members of other labor organizations.

The citation by the Association of *International Organization of Masters, Mates & Pilots v. NLRB*, 539 F.2d 554 (5th Cir. 1976) and *International Organization of Masters, Mates & Pilots v. NLRB*, 486 F.2d 1271 (D.C. Cir. 1973) for the proposition that the supervisors need not be adjusting grievances of members of the union to which they belong in order to make out a violation of § 8(b)(1)(B) is inapposite and in fact highlights the point being made here. Those cases involved direct restraint and coercion of the employer, through picketing, to attempt to have a supervisor replaced, conduct which constitutes a classic violation of the Act and comes within its express terms and the legislative intent. *See Florida Power*, 417 U.S. at 798-99.

The significance in this case of the lack of any dealings with the Guild by certain of the supervisors, is in the fact that the Board is attempting to show not direct coercion of the employer, as in the picketing situation, but indirect coercion, through a diminution in the supervisor's effectiveness as a grievance adjuster in future dealings with the disciplining union. But where there are no such dealings—at least none with the disciplining union—any possible carry-over effect is attenuated to zero.

Although the Board found that producers and story editors adjusted writers' grievances, a conclusion which the Guild disputes,[29] even as to them the so-called grievance adjusting functions were so minimal as to require at least *some* rationale as to why there would be a carry-over effect. Instead, there was simply a citation to *Hammond*, which in turn relies only upon the amount of rank-and-file work done.

[29]See notes 7 and 8 and surrounding text, *supra*.

The answer to the question of whether discipline of a supervisor may adversely affect his future performance of § 8(b)(1)(B) functions for his employer, depends upon the reason for the discipline, or at least, upon what the supervisor could reasonably believe to be the basis for the discipline. Certain discipline of supervisors is recognized by the Board and the courts to be lawful, such as discipline for failing to comply with union registration rules,[30] or discipline imposed for performing rank-and-file work during a strike (as in *Florida Power*). In these cases the inference is that the discipline will not inhibit the supervisor's handling of his § 8(b)(1)(B) duties. What then of the supervisor who is fined for crossing his union's picket line; what inference can be drawn as to how, if at all, it will affect his § 8(b)(1)(B) functions? We submit that he will believe he is being disciplined for violating his union's strike rules, and not for any other reason or purpose.

Board Member (now chairman) Fanning, dissenting in *New York Typographical Union 6 (Triangle Publications, Inc.)*, 216 N.L.R.B. 896, 897 (1975) (one of the cases upon which the Board majority relied here in support of its decision [Bd. Pet. App. 13a n.6]), answered the question of what effect discipline for crossing a picket line would have this way:

> [I]n a strike situation what the supervisor does behind the picket line is, in the ordinary case . . . completely irrelevant. The union's interest is quite simply to preserve strike solidarity. . . . It is

[30]Local 453, Bhd. of Painters (Syd Gough & Sons), 183 N.L.R.B. 187 (1970); *see* Meat Cutters Union Local 81 v. NLRB (Safeway Stores), 458 F.2d 794, 798 n.12 (D.C. Cir. 1972).

> . . . specious to argue . . . that whatever the union's interest, it is reasonable to conclude that the supervisor will be affected in the future performance of his grievance adjustment or collective-bargaining duties. Can it seriously be argued that a supervisor who is disciplined for working during a lawful strike will relate that discipline to the manner in which he performed the particular function he was engaged in at the time the discipline was levied? Is not the only reasonable conclusion the supervisor can draw the conclusion that he has been disciplined simply for working at all? In the future, when the supervisor represents the employer at the bargaining table, is it reasonable for the supervisor to fear subsequent discipline if he faithfully represents management's viewpoint because of his prior discipline for working during a strike? *Id.* at 899.

Though it is reasonable to suppose that a supervisor who has been disciplined for the way in which he adjusts a grievance will be concerned about how he adjusts grievances in the future, when he is disciplined for crossing a picket line, "[t]he reasonable conclusion for the supervisor to draw is that if, once again in the future, he crosses a lawful picket line, he will, once again, be disciplined." *Triangle Publications*, 216 N.L.R.B. at 901.

Writing for the Court of Appeal majority in *Florida Power* prior to its affirmance by this Court, Judge Wright's common sense conclusion on the effect of disciplining a supervisor for crossing a picket line was that such "[d]iscipline, or the threat thereof, may well force a supervisor to observe a picket line, but it is questionable whether it will turn him into a believer in the union's cause." *IBEW v. NLRB* (*Florida Power & Light Co.*), 487 F.2d 1143, 1156 (D.C. Cir. 1973). The reason for that conclusion was that "[o]ur everyday experience tells us that the result of discipline is normally some degree of hostility toward the person or group imposing the discipline . . . ." *Ibid.*

Contrary to common sense, and with no evidentiary support, the Board has concluded that discipline for a reason unrelated to the supervisors' § 8(b)(1)(B) functions will have an adverse carry-over effect upon the performance of such functions. The Board has simply referred to its decisions in other cases, which are like "a litany, reciting conclusions by rote without factual explication." *NLRB v. American Cable System, Inc.*, 427 F.2d 446, 449 (5th Cir. 1970). Or in Board Member Fanning's words in *Triangle Publications, Inc.*, 216 N.L.R.B. 896, 900 (1975), "[t]he majority says it [discipline] will [have an adverse effect] because (a) the Board said so in *Hammond Publishers* and (b) the Board says so now."

By concluding that a supervisor will be adversely affected in the performance of his § 8(b)(1)(B) functions if the Guild disciplines him for crossing a lawful picket line, the Board has simply resurrected the conflict of loyalties theory, which in *Florida Power* was shown wrong.

2. The Supervisors' Failure to Show Up for Work, Whether as a Result of Discipline or Otherwise, Does Not Violate § 8(b)(1)(B).

The Board's brief and the ALJ make an additional argument not specifically relied upon by the Board and one which under cases such as *Burlington Truck Lines, Inc. v. U.S.*, 371 U.S. 156, 169 (1962); *SEC v. Chenery*, 332 U.S. 194, 196 (1947) should not be considered by the Court. In any event, the theory lacks merit and comes down to this: by disciplining supervisors and thus securing their absence from work, the Guild "coerced and restrained their employers in the selection of those specific producers and directors for the purpose of collective bargaining and the adjustment of grievances" [Bd. Pet. App. 64a].

This theory leads to an anomalous result on a number of grounds. First, it focuses upon those who did not show up for work, thereby resulting in the loss to their employers of a § 8(b)(1)(B) representative. But those who stayed away from their jobs were not the supervisors who were disciplined in this case, and there was no evidence that those who stayed away did so out of fear of discipline rather than because of appeals to their union consciousness.[31] It was the supervisors who *did* show up for work and with respect

[31] *Cf.* Honolulu Star-Bulletin, Ltd. v. NLRB, 270 F.2d 567, 570 (D.C. Cir. 1959). In Local 60, United Bhd. of Carpenters v. NLRB, 365 U.S. 651, 654 (1961), this Court admonished the Board that it could not order the reimbursement of dues to all employees who were found to be working under an illegal union security arrangement, because, although

> [o]n the record before us they [the employer and the union] have engaged in prohibited activity . . . [,] there is no evidence that any of them coerced a single employee to join the union ranks or to remain as members. All of the employees affected by the present order were union members when employed on the job in question. So far as we know they may have been members for years on end.

In the present case, while there is evidence of discipline and threats of discipline, there is no evidence as to the reasons those who did *not* cross the picket line honored it.

to whom the employer in fact was *not* deprived of his representatives on this occasion, who were disciplined. Although the employers were clearly not restrained or coerced when they in fact had the services of these supervisors, the supervisors themselves may have been restrained or coerced. Supervisors, however, are not the object of § 8(b)(1)(B)'s protection, and indeed, supervisors have no protection whatsoever under the Act.[32]

Second, this theory proves too much. By looking at the absence of the supervisor, clearly protected activity will be ensnared, such as appealing to him to stay away from work,[33] as well as activity which causes that result through restraint and coercion upon the supervisor. In either case the result so far as the

[32] Not since 1947, when Congress amended the definition of "employee" in § 2(3) of the Act, 29 U.S.C. § 152(3) to exclude supervisors, have supervisors been entitled to the benefits of this law in terms of protection from either their employers or unions. *Florida Power*, 417 U.S. at 807-09; Beasley v. Food Fair, 416 U.S. 653, 656 (1974). See also note 34, *infra*.

[33] Unions may appeal to employees, suppliers, and others who deal with a struck employer, to urge them to cease working for, or otherwise doing business with the employer during the course of a lawful primary strike. *See* NLRA § 13, 29 U.S.C. § 163; United Steelworkers v. NLRB (Carrier Corp.), 376 U.S. 492, 499 (1964); Local 761, Int'l Union of Electrical Workers v. NLRB (General Elec.), 366 U.S. 667, 672 (1961); NLRB v. International Rice Milling Co., 341 U.S. 665, 672-73 (1951). The "restrain or coerce" language of § 8(b)(1) is common to both subsections (A) and (B). Speaking in a case dealing with subsection (A), in which the question was whether picketing for recognitional purposes constituted a violation of that language, the Court in NLRB v. Drivers

(This footnote is continued on next page)

employer is concerned is the same: he has lost the services of his bargainer or grievance adjuster.

Moreover, this theory too fails to engage in the analysis directed by *Florida Power*, namely, to determine the indirect effect upon the employer of the supervisor's future ability (or inability) to perform his § 8(b)(1)(B) duties.

3. The Board's Decision Results in an Unwarranted Interference With the Bargaining Process, and an Inequitable Treatment of Supervisors.

For § 8(b)((1)(B) purposes, Member Fanning suggests that "the 'loyalty' an employer may demand from any supervisor is, *during a strike*, no greater than the loyalty that may be demanded by his union." *Triangle Publications*, 216 N.L.R.B. at 900 (emphasis in original); *see Florida Power*, 417 U.S. 812 n.22. This view is supported by the language and legislative history of the Act.

The legislative scheme has been to permit employers to secure their supervisors' loyalty through requiring the supervisors, on pain of discharge, to sever their membership and fraternal relations with unions. *Florida Power*, 417 U.S. at 807-08.[34]

Local 639 (Curtis Bros.), 362 U.S. 274, 282 (1960) said: "§ 13 is a command of Congress to the courts to resolve doubts and ambiguities in favor of an interpretation of § 8(b)(1)(A) which safeguards the right to strike as understood prior to the passage of the Taft-Hartley Act."

[34]The legislative history indicates that by excluding supervisors from the Act's coverage, Congress left them free to form or join unions; however, the employer can assure his supervisors' freedom from union rules and regulations by in effect requiring them to be non-union:

> The bill provides that foremen shall not be considered employees under the National Labor Relations Act. They may form unions if they please, or join unions, but they do not have the protection of the National Labor Relations Act. *They are subject to discharge for union activity*, and they are generally restored to the basis which they enjoyed before the passage of the Wagner Act.

93 Cong. Rec. 3836, 2 Legislative History 1008 (emphasis added); *see also* H. Min. Rep. No. 245, 80th Cong., 1st Sess. 7, 1 Legislative History 362 (recognizing that if supervisors are to be left unprotected under the Act, the employer will have "unlimited right to discharge them for union activities . . ."); 1 Legislative History 652 (remarks of Rep. Klein).

"Congress' solution" to the problem of divided loyalty, "was essentially one of providing the employer with options." *Florida Power*, 417 U.S. at 812. Where the employer permits supervisors to retain their union connections, he does so with recognition that the union will thereby have increased economic strength in the event of a strike. If he nonetheless considers membership to be advantageous—as the employers here did, because *membership in the Guild was found to be a significant benefit to the employer* [Bd. Pet. App. 62a][35]—he may protect the supervisor from intra-union discipline through the collective bargaining process.[36] Conversely, either as an inducement to the union to permit the supervisors to remain in the organization, or for any other reason, the employer may agree to give up such protection, as was done here.[37]

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[35]The Board found that membership in the Guild provided the hyphenates with "significant contacts with writer-members of Respondent, a sense of pride in belonging to the organization, and, perhaps most important, providing the hyphenate with a wider range of capabilities and thus enhancing his usefulness to his employer" [Bd. Pet. App. 62a].

[36]*See, e.g., Florida Power*, 417 U.S. at 796 (collective bargaining agreement clause protects supervisors); NLRB v. News Syndicate Co., 365 U.S. 695, 696 (1961) (*ibid.*); Comment, 1976 Wis. L. Rev. 866, 897-98.

[37]Article 6, the Guild (Union) Shop provision of the expired Agreement, provided in section 7 [A 245 (emphasis added)]:

(This footnote is continued on next page)

Another option is for the employer to indemnify the supervisor for any fine imposed, or to provide legal counsel in any union disciplinary proceeding (both options having been exercised in this case [A 481, 482]).

What the Act provides to the employer, in other words, is freedom to deal with the problem through self-help, collective bargaining, or both, and that is sufficient protection.[38] This Court has cautioned the Board to remain aloof from the collective bargaining process and to permit the parties to work out their own agreements. *NLRB v. Insurance Agents' Union*, 361 U.S. 477, 490 (1960); *see H. K. Porter Co. v. NLRB*, 397 U.S. 99, 108 (1970). It is not for the Board to grant to one of the parties that which it was unable to secure at the bargaining table, for the Act "does [not] contain a charter for the National Labor Relations Board to act at large in equalizing disparities of bargaining power between employer and union." *Insurance Agents', supra*, 361 U.S. at 490. That the employers would find it economically or otherwise difficult through the collective bargaining process to protect the supervisors [Networks Br. at 46-47] is irrelevant. In *Lodge 76, IAM v. Wisconsin Employ-*

The Guild represents and warrants that *discipline*, resignation, admission, reinstatement, readmission, and all other matters relating to membership status *will at all times during the term hereof be within the exclusive jurisdiction of the Guild;* and the Guild agrees that it will exercise such jurisdiction subject to and in accordance with the provisions and intent of this Article 6 and of any other applicable provisions of this Basic Agreement.

[38]*Cf.* Scofield v. NLRB, 394 U.S. 423, 433 (1969): "We discern no basis in the statutory policy encouraging collective bargaining for giving the employer a better bargain than he has been able to strike at the bargaining table."

ment Relations Comm'n, 427 U.S. 132, 149 (1976) this Court stated that "the economic weakness of the affected party cannot justify state aid contrary to federal law," for the use of economic weapons is part and parcel of the process of collective bargaining.

Finally, in terms of the equity of the situation, certain of the supervisors—story editors—have their terms and conditions of employment covered by the Agreement negotiated by the Guild.[39] Moreover, there is frequent interchange among classifications, so that a Guild member may be producing a show that he has written, and be performing concurrent writing services [A 60, 69, 71-72; Networks Br. at 4-5]. A supervisor today is a writer tomorrow, or even at the same time.

In *Florida Power* the Court dealt with supervisors' obligations in a strike situation. 417 U.S. at 812 n.22:

> [T]he fact that the supervisor will in some measure be the beneficiary of any advantages secured by the union through the strike makes it inherently inequitable that he be allowed to function as a strikebreaker without incurring union sanctions.

The Board has completely ignored this in all subsequent decisions.

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[39]Story editors, albeit supervisors, are members of the bargaining unit represented by the Guild and have their job descriptions and compensation regulated by the Agreement [GCX 2, A 251; GCX 9, A 338-39]. In addition to story editors, employers who use hyphenates to perform extensive writing must provide the hyphenates with a separate contract covering their writing services [GCX 2, A 250; A 35-36], for which they are guaranteed not less than the applicable Guild minimum, without offsets [*ibid.*]. Of those hyphenates questioned on the matter, each had a personal service contract under which the employer could require them to perform covered writing work [A 103, 110-11, 133, 195-96, 218-19, 224].

The evidence showed that Guild membership is retained by some supervisors because of the desire to write in the future [A 81], and because they perform writing functions in connection with their current employment [A 148].[40] Membership is not only of monetary and moral benefit to the writer, *qua* writer, but as the Board acknowledges, it is of benefit to the employer, and thus is an association which makes the person a more esteemed supervisor.

The issue of whether union members who are supervisors may be disciplined for crossing a picket line, by logic and by the legislative history of § 8(b)(1)(B) must be answered in the affirmative. The equities of the situation too, demand that supervisors not be immune from discipline for strikebreaking.

II.

FLORIDA POWER NEED NOT BE REVIEWED, BUT NEEDS ONLY TO BE PROPERLY APPLIED BY THE BOARD.

The Networks would have this Court review its decision in *Florida Power*, on the ground that the distinctions between supervisors and non-supervisors may have become blurred. They cite and quote legislative history for the proposition that Congress intended the distinction between the two to be sharp [Networks

[40]The fact that resignation from the Guild during the pendency of collective bargaining negotiations is disallowed [A 579], simply makes the Guild's rules in this respect analogous to the Board's. Employers and unions may not withdraw from multi-party bargaining once negotiations have commenced. Retail Associates, Inc., 120 N.L.R.B. 388 (1958). And refusal to execute a collective bargaining agreement after a purported untimely withdrawal, is an unfair labor practice. NLRB v. Sheridan Creations, Inc., 357 F.2d 245, 247-48 (2d Cir. 1966), *cert. denied*, 385 U.S. 1005 (1967).

Br. at 39-40]; but the Networks make this argument by themselves blurring the line between the Congressional debate in 1947 over the amendments to §§ 2(3), 2(11) and 14(a) of the Act, which dealt with supervisors, and the debate on § 8(b)(1)(B), dealing with representatives for the purpose of collective bargaining and grievance adjustment [*id.* at 41].

The Networks contend that there was a legislative scheme dealing with §§ 2(3), 2(11), 14(a) and 8(b)(1)(B), which is best effectuated by preventing unions from taking any action that might interfere with the supervisors' loyalty to the employer.

This argument presupposes that the four sections were amended or adopted as a result of a unitary scheme [Networks Br. at 41], which they were not. *Florida Power*, 417 U.S. at 805-13. The argument also presupposes that supervisors themselves are entitled under the Act to protection from discipline, regardless of the effect or lack of effect upon their employers, again an argument which does not comport with the facts.[41]

That the Board has keyed in on the type of work being performed by the supervisor, and whether such work was more or less than minimally rank-and-file, only shows that the Board's reading of *Florida Power* is too narrow and mechanistic, not that *Florida Power* is wrong [Networks Br. at 44-45].

The Networks also argue that "because they may return to writer . . . status at some point in the future, the Networks . . . could not protect their § 8(b)(1)(B) rights by refusing to hire supervisors who were union members" [Networks Br. at 46-47].

[41]See note 32, *supra*.

This industry is such that there is constant change of status, so that the the individual writer or hyphenate is periodically covered and then not covered by the Agreement. The Networks would have the happenstance of the supervisor's status on the day of, or during the strike, determine whether he may be disciplined.[42] The fact is that he may truly be during the year primarily a writer and a beneficiary of the Agreement which, by the strike that he is breaking, the Guild is attempting to improve.[43] More importantly, the economic difficulties encountered is one of the costs of free collective bargaining. *See Lodge 76, IAM v. Wisconsin Employment Relations Comm'n*, 427 U.S. 132, 149 (1976).

For these reasons this argument by the Networks lacks foundation in the Act or the Congressional intent.

Conclusion.

The Board was wrong in the cases preceding this Court's decision in *Florida Power*. Rather than accept that decision, the Board has sought to avoid it by construing it as narrowly as possible. But just the opposite should be the case: where a restriction is sought to be imposed on picketing or economic action, *that restriction* should be construed as narrowly as possible with a view to preserving this necessary adjunct to collective bargaining.

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[42]During the course of the strike one writer-producer who had been honoring the Guild's picket line was promoted to an executive position, and he thereafter crossed the line [A 205-06].

[43]In any event, even when working under the Agreement there is no legal requirement for a supervisor to be a Guild member (and thus subject to its discipline), as opposed to merely tendering dues and fees. *See* NLRB v. General Motors Corp., 373 U.S. 734, 742 (1963).

The conclusion that the Guild restrained or coerced the charging parties in their selection of representatives for purposes of collective bargaining lacks merit, and the decision of the Court of Appeals should be affirmed. To avoid duplication, we have divided the argument with amicus curiae AFL-CIO. Amicus' brief shall trace the Board decisions since *Florida Power*, to show how in those cases, as well as in this case, the Board has failed to follow this Court's statutory analysis.

Respectfully submitted,

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